

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR JAMES STANLEY, JR.,

Defendant-Appellant.

UNPUBLISHED

June 12, 2014

No. 314660

Wayne Circuit Court

LC No. 12-006999-FC

Before: WILDER, P.J., and SAAD and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to commit great bodily harm less than murder, MCL 750.84, possession of a firearm by a convicted felon (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.¹ Defendant was sentenced, as a second habitual offender, MCL 769.10, to 5 to 15 years' imprisonment for the assault with intent to commit great bodily harm less than murder conviction, one to five years' imprisonment for the felon-in-possession conviction, and two years' imprisonment for the felony-firearm conviction. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS

The complainant, Kelwin Edwards testified that on August 29, 2011, sometime between 7:00 p.m. and 7:30 p.m., he was at a party store in Detroit, talking with the owner, Tom, when a man named Courtney Stanley (whom he also knew by the nickname "Furlay") appeared. Kelwin knew Furlay since the two were children. They worked together in the past and were generally on good terms. However, inside the party store, Furlay and Kelwin had a "heated" conversation regarding \$1,000 that Kelwin had loaned Furlay. Tom ordered the men outside. Outside of the store they encountered "Tootsie," a man, who was parked in front of the store in a burgundy LeSabre. Kelwin did not personally know Tootsie, but he did know Tootsie from the neighborhood. Kelwin also knew that Furlay and Tootsie were cousins. At trial, Kelwin

¹ Defendant's first trial ended in a mistrial. The facts in this case arose from defendant's second trial.

identified “Tootsie” as defendant. Defendant broke up a potential fist fight between Kelwin and Furlay.

Kelwin walked to his Suburban, which was parked on a side street that bordered the liquor store. He immediately noticed in his rearview mirror that defendant was a passenger in a car driven by a light skinned black male and that the car was racing to catch up with him. Kelwin could see defendant had a gun and was motioning the driver to go faster. Referencing the Dukes of Hazard, defendant noted that defendant “was trying to get his body out of the car. Half his body was, like his bottom on the car so he could aim.” Defendant began to shoot toward Kelwin’s Suburban. Kelwin believed he heard five gunshots. One of the shots hit Kelwin in the left, backside of his head. At one point he fell out of his Suburban and was lying in the street when defendant and the light-skinned man drove past him. Kelwin saw that Furlay was in the backseat. Kelwin eventually gained enough strength to stand and drove home.

Kelwin originally told police officers that Tootsie shot him. He later learned defendant’s real name and told officers. Kelwin saw defendant on two separate occasions after the shooting and called the police.

In an attempt to impeach Kelwin and his wife and in order to show that Furlay, not defendant, was responsible for the shooting, defendant called Detroit Police Officer Tisha Prater as a witness. After receiving a police run for a gunshot victim, Prater went to Detroit Receiving Hospital where she spoke with Kelwin’s wife: “Mrs. Edwards shared with me that her husband was shot by an old friend who he sold dope to years ago.”

Defendant was convicted and sentenced as outlined above and now appeals as of right.

II. JUDICIAL BIAS

First, defendant contends that the trial court’s comments to the jury after defendant’s closing argument violated defendant’s right to a fair trial. We disagree.

We review claims of judicial misconduct to determine whether the trial judge’s statements evidenced partiality that could have prejudiced the jury against the defendant. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). This Court reviews the record as a whole, and may not take portions of the record out of context. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). Because this issue is unpreserved, it is reviewed for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

During defendant’s closing argument, defense counsel contended:

The thing that I’m sure [the prosecutor’s] going to come up, you know, and talk about is, you know, he just said he was involved, and why would he change his story? Well, ladies and gentlemen, I can’t answer you that. I don’t know why. But, what I can answer you that I thought it was interesting that Mr. [Kelwin] Edwards said that Furlay came and watched him testify. He came and watched him testify, ladies and gentlemen.

Now, I don't know why. I believe that Mr. Stanley, Furlay, has had some influence on Mr. [Kelwin] Edwards. I believe that he changed his story based on some of the things that happened outside of this courtroom. And I think he came and watched Mr. [Kelwin] Edwards testify to see what he would say.

The fact is, ladies and gentlemen, the only witness in this case, the only person who was there, is the only person whose credibility has been questioned in this case. [Kelwin's] the only person who's been shown to give alternative versions of what happened.

Right after he was shot, he never mentioned Arthur Stanley. He never mentioned [defendant, whose nickname is] Tootsie. Later, after he hears it from people, oh yeah, it was Arthur Stanley, it was Tootsie. He even said he'd heard it from people. But, on the day it happened, right after it happened, he says my old friend and a drug debt. That is not his old friend, ladies and gentlemen.

Following the conclusion of defendant's closing argument, the trial court stated the following to the jury:

Ladies and gentlemen, I called the lawyers up here after [defense counsel] was finished, because as I indicated to him when we were off the record and I called him up, I said, I'm troubled by the fact that you raised an argument with the jury about why Mr. [Kelwin] Edwards might have lied to you. And the suggestion was Furlay was here at the first trial, and that somehow that was an indication that there was some form of pressure put on Mr. [Kelwin] Edwards, and that's what made him lie and say that it was this Defendant who shot him, as opposed to Furlay.

And what I want to stress to you is that the reason I was troubled is I heard no evidence of that, whatsoever, during this trial. So, when he makes that inference to you, I want to make sure you understand that's a theory of his regarding the case, and I have heard nothing in our trial, in terms of evidence to support that. Okay?

"A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct." *Paquette*, 214 Mich App at 340. "A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *Id.* This Court must also ask whether "this statement was likely to cause the jury to believe that the trial court had any opinion regarding the case." *Id.* at 341. Furthermore, MCL 768.29 requires judges to "control" and "limit the introduction of . . . the argument of counsel to relevant" matters. In defendant's closing argument, defense counsel made assertions based on facts that were never introduced at trial. Specifically, defense counsel's assertion that Kelwin lied because Furlay said something to him, presumably a threat, outside of court, is entirely unsupported by the record. Thus, the trial court's comments did not deny defendant of a fair trial; rather, the trial court's comments ensured a fair trial.

Also, a “curative instruction” can alleviate any prejudicial effect of an improper statement made by a judge during the trial. *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008). The trial court specifically told the jury:

My comments, rulings, questions, and instructions are also not evidence. It’s my duty to see the trial is conducted according the law, and to tell you the law that applies to this case. However, when I make a comment or give an instruction, I’m not trying to influence your vote or express a personal opinion about the case. If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion. You are the only judge of the facts, and you should decide this case from the evidence.

This instruction cured any potential prejudice created by the trial court’s statements.

III. DEFENDANT’S STANDARD 4 BRIEF

A. PROSECUTOR’S USE OF FALSE OR PERJURED TESTIMONY

In his Standard 4 Brief, defendant argues that he was denied due process because his conviction was obtained through the use of false and perjured testimony. We disagree.

This Court reviews unpreserved claims of prosecutorial misconduct for plain error. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). “Prosecutors . . . have a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath” and a “prosecutor has a duty to correct false evidence.” *People v Herndon*, 246 Mich App 371, 405; 633 NW2d 376 (2001). Although defendant contends that Kelwin and his wife testified falsely, he fails to cite specific examples of where either witness lied. Thus, we have no reason to conclude that any witness testified falsely, nor is there any reason to believe that the prosecutor knew that a witness was lying. Instead, defendant appears to argue that they simply were not worthy of belief.

B. SUFFICIENCY OF THE EVIDENCE AND GREAT WEIGHT OF THE EVIDENCE

Defendant argues that the evidence presented at trial was insufficient to sustain defendant’s conviction of assault with the intent to commit great bodily harm less than murder. Additionally, defendant contends that the verdict was against the great weight of the evidence. We disagree.

“In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor. The question on appeal is whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (internal quotation marks and citations omitted). When reviewing an unpreserved claim that a verdict is against the great weight of the evidence, this Court reviews it for plain error affecting a defendant’s substantial rights. *Carines*, 460 Mich at 763.

Defendant does not deny that the crime of intent to commit great bodily harm less than murder occurred; he disputes only the identity of the shooter. However, Kelwin did not waiver

in identifying defendant as the shooter. “An appellate court must remember that the jury is the sole judge of the facts. It is the function of the jury alone to listen to testimony, weigh the evidence and decide the questions of fact . . . Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony.” *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992) quoting *People v Palmer*, 392 Mich 370, 375–376; 220 NW2d 393 (1974). Taken in a light most favorable to the prosecution, there was clearly sufficient evidence that the crime occurred and that defendant was the perpetrator.

C. INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO INVESTIGATE OR CALL AN ALIBI WITNESS

Defendant next argues that his trial counsel was ineffective for failing to interview and present an alibi witness for defendant. We disagree.

Because the issue is unpreserved, our “review is limited to the existing record.” *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant first must show that counsel’s performance was below an objective standard of reasonableness. In doing so, the defendant must overcome the strong presumption that counsel’s assistance was sound trial strategy. Second, the defendant must show that, but for counsel’s deficient performance, it is reasonably probable that the result of the proceeding would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). The defendant has the burden of establishing the factual predicate of his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

“A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). “In general, the failure to call a witness can constitute ineffective assistance of counsel only when it ‘deprives the defendant of a substantial defense.’” *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (citation omitted). A defense is substantial if it might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), mod on other grounds 453 Mich 902 (1996).

There is no record evidence, whatsoever, that an alibi witness existed or defense trial counsel had any awareness of an alibi witness. Accordingly, defense trial counsel’s performance is presumed to have been effective.

D. IDENTIFICATION

Defendant also contends that he was denied a fair trial because Kelwin’s identification of defendant was tainted.

To establish a claim that an identification was unconstitutionally suggestive, a defendant must first show an “invalid identification procedure.” *People v Gray*, 457 Mich 107, 114; 577 NW2d 92 (1998).

We find it difficult to understand defendant’s argument. “It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court. And, where a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999) (internal citations omitted). This Court is limited to the record, and upon review of the record, we find no evidence regarding any suggestive identification procedure, let alone any alleged “invalidity” of that procedure. *Id.*

E. ADMISSION OF HEARSAY EVIDENCE

Finally, defendant argues that the trial court abused its discretion when, over defense objection, Detroit Police Officer Tisha Prater’s offered inflammatory and hearsay testimony. We disagree.

While defendant takes issue with testimony of his own witness, Officer Prater, we note that in fact, Prater’s testimony benefited defendant’s defense. Specifically, defense counsel asked Prater what Kelwin’s wife told her about the shooting, and Prater replied: “Mrs. Edwards shared with me that her husband was shot by an old friend who he sold dope to years ago,” thus implying that someone other than defendant shot Kelwin. The hearsay rule is not implicated by these facts, and defendant’s argument is without merit.²

Affirmed.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Kirsten Frank Kelly

² To the extent defendant argues that counsel was ineffective for failing to object to the testimony, we note that counsel was not required to make a meritless objection. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).